No. 87-1851

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DAVIS PACIFIC CORPORATION,
Petitioner,

vs.

VENTURA COUNTY FLOOD CONTROL DISTRICT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent hereby disagrees with the listing of questions presented by petitioner herein in that there have been no appropriate federal questions presented for review. However, if any question can be deemed as having been presented it would be as follows:

1. Whether the Fifth and Fourteenth Amendments require compensation to a private landowner by the public entity which properly and completely maintained a flood control facility at well over its design capacity and its capacity as built, and when the facility had been built by a completely separate entity.

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Defendant and respondent Ventura County Flood Control District hereby provides the within opposition to the petition for certiorari filed by plaintiff and petitioner Davis Pacific Corporation herein.

JURISDICTION

It is submitted that the discretionary decision of the California Supreme Court filed on April 6, 1988, to deny petitioner's petition for review, as well as the decisions of the California Court of Appeal, Second Appellate District, Division 6, and as well as the decision of the trial court in this action should not be reviewed by the United States Supreme Court in that jurisdiction is lacking.

Petitioner cites 28 U.S.C. § 1257 and Rule 17 of the Rules of the United States Supreme Court as authority for jurisdiction herein. However, both Rule 17 and 28 U.S.C. § 1257 require a "federal question," and require said federal question to have been set up and decided in the courts below. It is the position of this opposing party that no federal question has been presented herein by petitioner and no federal question has been brought up below.

It is a long settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows that the federal claim was adequately presented in the state court system. *Webb v. Webb* (1981) 451 U.S. 493, 496, 101 S.Ct. 1889. As stated in *Webb, supra* at page 499, the Court has consistently refused to decide federal constitutional issues raised for the first time on review of state court decisions. *See also Tacon v. Arizona* (1973) 410 U.S. 351, 352, 35 L.Ed.2d 346, 93 S.Ct. 998, (U.S. Supreme Court cannot decide issues raised for the first time when those questions were not raised by the petitioner below nor passed upon by the state supreme court).

See also Cardinale v. Louisiana (1969) 394 U.S. 437, 438, 439, 22 L.Ed.2d 398, 89 S.Ct. 1162 wherein the court stated as follows:

> "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions."

The court went on to state:

> "[There is] no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' Pet. 368, 391. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions . . . ."

The *Cardinale* court dismissed the writ for want of jurisdiction in view of that petitioner's failure to raise the issue below and because of the failure of the state court to pass on that issue.

It must *affirmatively* appear from the record that the federal question was presented to the highest court of the state having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. *Durley v. Mayo* (1956) 351 U.S. 277, 281, 100 L.Ed. 1178, 76 S.Ct. 806.

See also Southwestern Bell Telephone Company v. Oklahoma (1938) 303 U.S. 206, 212, 213, 82 L.Ed. 751, 58 S.Ct. 528, wherein the court stated:

> "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but

> that its decision of the federal question was necessary to the determination of the cause; *that the federal question was actually decided* or that the judgment as rendered could not have been given without deciding it. [Citations.]" (Emphasis added.)

A mere indefinite reference below to the United States Constitution does not present a substantial constitutional question sufficient to confer jurisdiction upon this court. *Seaboard Air Line Railway Company v. Watson* (1932) 287 U.S. 86, 77 L.Ed. 180, 53 S.Ct. 32. As will be demonstrated infra, this is at most what petitioner has done. It is not enough that there may be somewhere hidden in the record a question which, if it had been raised, would have been of a federal nature. This principle excludes from consideration of the court herein a question not presented in or passed upon by a lower court of appeal. *Whitney v. California* (1927) 274 U.S. 357, 362, 363, 71 L.Ed. 1095, 47 S.Ct. 641.

In order to maintain jurisdiction herein, the right, title, privilege or immunity relied upon must not only be specially set up or claimed, but at the proper time and in the proper way. *Mutual Life Insurance Company v. McGrew* (1903) 188 U.S. 291, 308, 47 L.Ed. 480, 23 S.Ct. 375. As stated in *McGrew*, the proper time is in the trial court. Assignment of error is not properly made when made for the first time in a petition for rehearing after judgment or in a petition for writ of error. The assertion of the right must be made unmistakably and not left to mere inference. *Mutual Life Insurance Company v. McGrew, supra*, at pages 308 and 310.

The mere general statement that the decision of the court is violative of petitioner's rights is insufficient. *Clarke v. McDade* (1897) 165 U.S. 168, 41 L.Ed. 673, 17 S.Ct. 284, wherein the court stated:

> "A general statement that the decision of a court is against the constitutional rights of the objecting party or against the Fourteenth Amendment, or that it is without due process of law, particularly when these objections appear only in specifications of error, so called, will not raise a Federal question even where the judgment is a final one within the section of the Revised Statutes above mentioned. There must be at least some color of a Federal question. [Citation]"

Furthermore it has been held that to review the decision of the state court upon a question of *fact* is not within the jurisdiction of this Court. *Dower v. Richards* (1894) 151 U.S. 658, 663.

Petitioner has set up no federal question in the California Supreme Court nor in the Second District Court of Appeal of California. Additionally, no federal question was decided by the California courts. Furthermore no federal question is set up by the California Supreme Court's mere denial of petitioner's petition for review therein.

Furthermore, petitioner is required by Supreme Court Rule 21 to specify the stage in the proceedings at which the federal questions sought to be reviewed were raised, the method or manner of raising them, *and the way in which they were passed upon by the court.* In other words, petitioner has the burden by Rule 21 of demonstrating that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari. It is submitted that petitioner has not done this.

A review of the citations to the record by petitioner as setting up the federal question reveals that the federal question has not been sufficiently placed before the court, and *has not been decided by the court.*

Petitioner's first reference to CT11 and CT9 are merely blanket statements in plaintiff's complaint alleging that plaintiff was denied just compensation in violation of the United States and California Constitutions by means of the design, construction, and maintenance of the channel and of a bridge. The case went to trial only on California tort theories and on inverse condemnation under the California Constitution Article I, Section 19.

Plaintiff's reference to CT1689-1699 merely discusses the California Constitution inverse condemnation provision, Article I, Section 14, now Article I, Section 19. There is no mention of the United States Constitution nor of the Fifth or Fourteenth Amendment.

Petitioner's transcript reference to their opening brief on appeal pages 39 through 46 also refers only to the California Constitution, Article I, Section 19, discussing the policies behind the California inverse condemnation provisions. Again, there is no mention of the United States Constitution nor of the Fifth and Fourteenth Amendments.

Petitioner's reference to its reply brief on appeal pages 2 through 7 also discusses only the California Constitution, Article I, Section 19.

Petitioner's reference to its petition for rehearing pages 1 through 7 again discusses the California Constitution Article I, Section 19 inverse condemnation provision. The only mention of the United States Constitution is a blanket statement that the court's refusal to allow Davis Pacific Corporation its just compensation is in direct violation of the Fifth and Fourteenth Amendments to the Federal Constitution as well as Article I, Section 19 of the California Constitution. That is the only discussion of or reference to the United States Constitution. There is *no argument* concerning the constitution, *no cases* discussing

or supporting said assertion, and there is *no showing of error.*

Lastly, petitioner's reference to its petition for review to the California Supreme Court pages 10 through 26 refers only to California Constitution Article I, Section 19, and contains the same blanket sentence as was contained in the petition for rehearing. Again, *no support or argument* was presented—concerning a possible federal constitutional violation.

Indeed, on reading page 2 of petitioner's petition for review to the California Supreme Court, wherein the issues presented for review are listed, it becomes obvious that no federal question was presented to the California Supreme Court. The issues presented therein are as follows:

> "1. To determine whether this court's constitutional decision in *Holtz v. Superior Court* (1970) 3 Cal.3d 296, 90 Cal.Rtpr. 345, 475 P.2d 441, extends to flood damage resulting from the failure of a public improvement operating as deliberately designed, constructed and maintained (cf. *Belair v. Riverside County Flood Control*, number S001035, now pending);
>
> 2. To determine whether this court's 'reasonable use' doctrine of *Keys v. Romley* (1966) 64 Cal.2d 396, 50 Cal.Rtpr. 273, exonerates a public entity from constitutional condemnation liability based on financial ability; and
>
> 3. To determine whether a public entity has any duty in contract, tort or nuisance to maintain its flood control facilities."

The cases mentioned therein, to wit *Holtz v. Superior Court, supra,* and *Keys v. Romley, supra* do not discuss or decide a federal question nor the United States Constitution. *Holtz* is completely a California Constitution

Article I, § 14 case. *Keys* merely discussed the right of a property owner to discharge surface waters onto another's land, and decided that an upper landowner has a duty of reasonable care in using its property. *It can be seen that no federal question was presented to the California Supreme Court.*

There was no reference to any Federal Constitutional issue in any of the jury instructions given (CT2157-2227, RT2823-2848), nor in the jury instructions not given (CT2228-2295), nor in plaintiff's closing argument to the jury (RT2655-2745, 2791-2804), nor in plaintiff's argument to the court in the inverse condemnation phase (RT2807-2823).

The California inverse condemnation phase was tried before the court. The court made the findings of fact quoted in appendix D to the petition for certiorari (containing the typographical error on page D3 which lists the date of failure of the facility as February 15, 1980, when in fact it was February 16, 1980). As set forth, no discussion of a federal constitutional question was made at that time or in said decision.

The California Court of Appeal issued two unpublished decisions concerning this action, the first having been vacated and superseded by the second decision which is entitled "Opinion on Rehearing," and is attached to petitioner's petition as Appendix B. A perusal of these decisions reveals that *neither decision mentions a federal constitutional question nor rules on one.* They certainly make no holding either expressly or by inference that the 5th and 14th Amendments to the United States Constitution have a financial exemption. The only issues in said decision concern causes of action arising out of State tort law and inverse condemnation under the California Constitution.

As set forth *supra*, a federal question is not brought up by merely mentioning it. However, even if it could be, since there is no direct civil action for damages against a defendant for violation of its Fifth and Fourteenth Amendment rights, and there is no civil rights cause of action set up or decided, a mention of the federal constitution is insufficient on those grounds as well.

This is a civil action. Petitioner is not challenging a statute as unconstitutional, nor is petitioner discussing a constitutional violation in a criminal trial. And, as set forth, there is no direct civil action for damages as against defendant herein for violation of Fifth and Fourteenth Amendment rights.

Plaintiff's forum as to the U.S. Constitution, if it exists at all, is under 42 U.S.C. § 1983. The only direct use of the Constitutional Amendments generally involves situations where certain improperly obtained evidence is suppressed, or in the enjoining of an unconstitutional State statute.

While *Bivens v. Six Unknown Named Federal Narcotics Agents* (1971) 403 U.S. 388, 29 L.Ed.2d 619, 91 S.Ct. 1999, provided for a direct action as against the Federal Government and its employees for violation of that plaintiff's constitutional rights, *there is no Bivens action against a municipality or its employees. Kostka v. Hogg* (1st Cir. 1977) 560 F.2d 37, 42. *Bivens* provided a direct action as against the Federal government and Federal employees because a 42 U.S.C. § 1983 action did not apply to the Federal government and Federal employees. However, since a 42 U.S.C. § 1983 action is theoretically available against these moving defendants, a direct *Bivens* action cannot be justified. Section 1983, not *Bivens*, is the appropriate vehicle for redressing Constitutional claims against a local public entity. *Graves v. Wayne County* (D.C. Mich. 1984) 577 F.Supp. 1008, 1013, interpreting *Carlson v. Green* (1980) 446 U.S. 14, 64 L.Ed.2d 15, 100 S.Ct. 1468.

If petitioner is permitted to bypass the pleading and proof requirements of 42 U.S.C. § 1983 by bringing a direct action against respondent herein, especially when neither the trial nor the State appeals concerned the Federal Constitution, section 1983 would be effectively emasculated.

Furthermore, technically, and by petitioner's own words, petitioner is requesting certiorari only to review the decision of the California Supreme Court filed April 6, 1988. All that decision is is a denial of petition for review. Such a decision is not itself reviewable.

Article VI § 12 of the California Constitution provides as follows:

> "(b) The Supreme Court *may* review the decision of a court of appeal in any cause."

Said discretionary decision is of course not itself reviewable and cannot violate a right of petitioner herein under the Federal Constitution.

In short, it is an insult to this Supreme Court and to the United States Constitution to construe a California Appellate decision based only on the California Constitution and California tort law to apply to the United States Constitution without any discussion of the United States Constitutional Amendments violated, how they were violated, duties created thereunder, standards of review, and the like. As presented by petitioner, this is a California inverse condemnation case pure and simple. Furthermore, the factual decision of the trial court below is not reviewable herein.

STATEMENT OF THE CASE

This action involves flooding which occurred when the Calleguas Creek Channel breached, causing damage to plaintiff's property.

Historically, the area of which plaintiff's property is a part has been marshland, and generally a flood plain (RT1920-1921; defendant's Exhibits 1, 8, 33, 53). In fact, defendant's Exhibit 33, a 1919 topographic map of the area, specifically labels the area "flood land." A long-time farmer in the area also testified that the area was designated as flood land (RT395, 404). The area has had a history of drainage problems (RT1967). The Calleguas Creek Watershed was described by plaintiff in his opening statement as the area comprising the Simi Valley, Conejo Valley, and Santa Rosa Valley, which drain into Calleguas Creek.

In the 1930's, in order to protect their own property, the various landowners began constructing levees made of sand. After a time, natural patterns of deposition raised the bottom of the channel above the elevation of the neighboring farmland. These farmers' levees did not eliminate flooding (RT413, 2336, 2400, 2403). The landowners remained worried that these levees would give out and that their lands would once again be flooded (RT439,2464,2429,2430).

In 1960, the project which is the subject of this action was created. This project was an enhancement of the farmers' levees. The Simi Valley Soil Conservation District and the Calleguas Conservation District were local sponsors to the project (RT1121). These Districts, which were by their agreement with the Federal Soil Conservation Service (SCS) to be responsible for maintenance of the project once it was built, entered into an agreement with the Ventura County Flood Control District (FCD) whereby the FCD would be responsible for maintaining the project once it was completed (RT1121-1122). There was no direct agreement between the FCD and the SCS. The FCD was not involved in the design, construction, nor inspection phase of the

project. While certain FCD employees attended a few meetings, its involvement was quite limited (RT465-466).

It is undisputed that the Soil Conservation Service of the U.S. Department of Agriculture (SCS) was responsible for the design, construction, and inspection of the project. The design and construction of the project was accomplished by the Wilsey & Hamm Engineering Firm, which was hired by the Federal SCS. In general, the project involved cutting some areas of the old farmers' levees, filling others, adding rock rip-rap on the inside of the channel to a depth of three feet below the channel bottom, and clearing the extensive vegetation which was in the channel bottom. The rip-rap was designed to extend below the channel bottom because at high flows, the sandy bottom becomes liquid and travels (RT634, 2447).

The enhanced channel was designed to carry and withstand a flow of 15,000 cubic feet per second (cfs) (RT963, 1182, 2259). *There is no evidence whatsoever that the channel was designed nor contemplated to withstand a flow of greater than 15,000 cfs* (RT1184, 2270, 2501). It was certainly not expected that the channel would hold 25,000 cfs (RT1184, 1185, 1219, 2447). Contrary to petitioner's suggestion, *the project greatly helped the situation* (RT1189, 1957, 2430).

There was testimony at the Trial that there had been a flow in the Calleguas Channel in 1969 of 16,300 cfs, and in 1978 of 18,700 cfs, and yet the channel, which was designed only for 15,000 cfs, held (RT811, 819, 882, 2478, 2716). During the twenty years between the construction of the project and the incident which is the subject of this action, extensive maintenance activity was undertaken by the FCD and *no evidence of negligent maintenance was presented.* This maintenance included bringing rock in to create a usable roadway on the top of the levee, maintaining that road, cleaning out the channel of debris and sedimentation,

rodent control, and the like. (RT437, 843-846, 871, 940, 943, 944, 2085, 2088, 2089, 2090, 2105).

On February 16, 1980, the west levee broke on the outside of a curve at Station 148 of the channel at a flow of approximately 25,190 cfs (RT1429, 2477, 2658). *This quantity of flow greatly exceeded the design capacity of the channel.*

In 1979, a survey had revealed that the elevation of the road running along the top of the levee was approximately two feet below the elevation shown in the design plans. The design had called for rock rip-rap on the inside of the channel to a certain height, and then two feet of sandy material on top of the rip-rap. During the 1979 survey, the rip-rap height was correct, but the level of the road was even with the top of the rip-rap.

One of the major factual issues around which this action revolved is whether in fact the project was constructed without the extra two feet of sand, or whether negligent maintenance caused the levee to lower two feet in elevation from its original design.

Extensive evidence was presented that the levee was in fact *not built to design height*, but that the design *rip-rap* elevation was taken to be the critical elevation, and *the extra two feet of sand was never placed on top of the rip-rap* (defendant's Exhibits 6 and 7, and RT621, 634, 821-822, 863, 864, 1158, 1433, 2084). *Defendants Exhibits 6 and 7 were photographs taken at the time of construction, from road level, and demonstrate clearly that the level of rip-rap was even with the road on the top of the levee.* There is no indication that two extra feet of sand was *ever* placed above this. There was testimony that, in 1964, the rip-rap was even with the road surface (RT621, 2084). The final survey records were never found (RT1150, 1191). In fact, Ronald Calhoun, the Vice President of Wilsey & Hamm, was

puzzled as to the purpose of the two extra feet, and was of the opinion that two extra feet of exposed sand above the rip-rap would erode at higher flows and thus would be fairly useless (RT2268, 2270, 2284).

In order to obtain the result that, in 1980 (and in fact as early as 1964), the rip-rap was even with the service road, three possibilities exist. The first is that the project was built as it existed in 1980, *i.e.*, the rip-rap at the proper height, and without the useless two extra feet of sand. The second is that the project was created with the rip-rap to the proper elevation, the two feet of sand above that, and then the two feet of sand inexplicably eroded or subsided uniformly two feet over the entire length of the levee system. The third alternative is that the contractor made a gift of two extra feet of rip-rap (at a time when both sand and rock were scarce) covering where the exposed sand should have been and then the entire two feet either eroded or subsided, again over the entire length of the project. There is no evidence whatsoever that the latter two alternatives occurred, and there is extensive evidence that the levees were not built to design specifications in the first place.

In any event, petitioner's theory seemed to be based on the claim that the levees were built to specification by SCS, that the two extra feet of sand disappeared as a result of negligent maintenance on the part of the Ventura County FCD, and that this two extra feet of sand would have prevented the breach. Petitioner's theory before the California Supreme Court seemed to be that the project was built (by the Federal Government), and that the Ventura County Flood Control District should automatically pay for plaintiff's damages. Petitioner attempted to hold the Ventura County Flood Control District responsible on theories of negligence, inverse condemnation, nuisance, and breach of contract.

Petitioner's theory now seems to be that the damage to its property is violative of the Fifth and Fourteenth Amendments to the United States Constitution and that therefore the Ventura County Flood Control District should automatically pay for said damages regardless of the fact that it did not construct the improvement and was held by the California Courts to have performed its maintenance duty (its only duty) admirably and completely.

Two theories concerning the mechanism of breakout of the levee were set forth at Trial. Petitioner's theory was based on the mechanism of overtopping (overflow) of the levee. However, no convincing testimony was elicited concerning this theory, since it was based on a greatly over-simplified computer model (HEC II) and incorrect values for certain variables in the computer modeling program (RT1311, 1318, 1320, 1321, 1377, 1315, 1355-1357, 1361, 1378, 1383, 1454-1456, 2181-2183, 2474-2475, 2529). The HEC II program assumes that the bottom and sides of the channel are solid (when in fact the Calleguas channel is a soft-bottom channel), does not deal with a sediment carrying channel (which this channel is), does not accurately depict the change in the channel cross-sections, nor does it account for scour on the outside of a curve nor for change in the roughness of the channel as bed forms change, nor can it handle the bend in the channel, nor does it consider possible failure of rip-rap or undermining or tractive forces pulling at the rip-rap, nor does it take turbulence into account, nor does it take centrifugal force around a curve into account (RT532-536, 1315, 1355-1357, 1361, 1378, 1454, 1455-1456, 2181-2183, 2474-2475, 2529).

The FCD's theory with regard to the mechanism of the breakout was amply supported by the evidence. That theory was that, because of the fact that the rip-rap extended only three feet below the soft bed of the channel, which was a depth which was agreed to be insufficient to hold a flow of

25,000 cfs (RT1345, 639-640, 2447), the forces were such that the rock rip-rap was undermined and slumped into the channel, causing the breakout (RT2169-2170, 2448-2450). The flow regime which occurred in the channel at the time of the breakout was the standing wave phenomenon (RT2131-2132, 2136, 1060-1062, 2113, 2119). In addition, great turbulence occurs on the outside of a curve, providing scour, where the bed of the channel at and under the rip-rap are eaten away. Convincing evidence that this scour occurred at the location of the breakout was presented at the Trial (RT1741-1744-1745, 2047-2048). Based on eyewitness testimony, the unrefuted evidence of the depth of scour, and on complex mathematical formulations which were far more accurate than the HEC II model used by plaintiff's experts, the defense experts were of the opinion that undermining, not overtopping, was the mechanism of the breakout in the instant action (RT293, 305, 307, 528, 682-683, 1060-1062, 1185, 1219, 1741, 1744-1745, 2047-2048, 2113, 2119, 2115, 2116, 2118, 2135, 2136, 2142, 2145-2147, 2169-2170, 2171-2172, 2179, 2183-2185, 2232-3233, 2235, 2443, 2448, 2450, 2456, 2478, 2510, 2514, 2563, 2577, 2581, 2595).

The evidence was overwhelming that the failure resulted from the fact that the rip-rap was originally placed only to a depth of three feet below the dry channel bottom, in order to maintain a flow of 15,000 cfs, and that the liquification of the bottom of the channel resulting from the flow, along with the turbulence and scour conditions existing in flow regimes above 15,000 cfs, undermined the rip-rap, causing the levee to fail. When it is understood that this is the most credible and probable mechanism of the breakout, the discrepancy in the height of the levee, to wit the two extra feet of sand, becomes irrelevant.

The plaintiff's complaint as against the FCD sought recovery on theories of diversion of waters from a natural

watercourse; negligent design, construction, and maintenance of the channel; nuisance; inverse condemnation; and breach of contract. The issues which were determined at Trial concerned inverse condemnation (*under the California Constitution only*) with respect to the maintenance of the channel, dangerous condition of public property, and breach of contract. Petitioner's theory, essentially, was that the levee was built to specification, and that the FCD is responsible for permitting the levee to subside two feet, thereby causing the breach of the channel. Petitioner makes the further claim that, since the project was built and failed, that the FCD should automatically be liable and that the proximate causal connection *with the FCD* is unnecessary.

The FCD presented a Motion in Limine to exclude evidence of upstream development in any manner that would demonstrate a duty on the part of the FCD to increase the capacity of the channel (CT1854-1872). The ruling on this Motion in Limine was for the most part the subject of plaintiff's appeal. However petitioner seems to have abandoned this issue insofar as California and U. S. Supreme Court review is concerned.

The Trial Court recognized that the FCD had no obligation to increase the capacity of the channel, merely *to maintain it as built*. Appellant's citations in its briefs to the ruling on this issue referred only to the motions themselves and generally to 100 pages of argument. In actuality, the ruling was that evidence of upstream development would not be permitted as it was directly contrary to the law as it presently stood (and still stands), and since it would tend to place on the FCD an obligation that it could not necessarily fulfill because there was no responsibility for upstream development nor funding therefor (RT96-97). The Court opined that the evidence required to deal with the issues of upstream development would take an inordinate amount of

time (RT96) and would place an extra burden on the FCD which was not placed upon it by law (RT100, 101).

Although counsel for plaintiff stated to the Court that *it was not contending that the FCD had a duty to change the design of the channel or levees*, but merely the duty to maintain them as originally designed and built (RT92, 93, 1099), the Court stated that it made its ruling because it did not wish to imply to the jury that the FCD had any duty to take care of the additional runoff which would be the result of the extensive upstream development which occurred.

After being requested to reconsider its ruling, and after considering the further papers and argument proffered by plaintiff, the Court then ruled that the FCD was not obligated under any theory to improve or increase the facility because of upstream development or use (RT190). However, *the Court did permit evidence of this increased flow* (RT190, 811, 819, 882, 2478, 2716). The Court, too, remarked to plaintiff that it was still able to show negligence without the need of evidence of upstream development (RT194). In fact, plaintiff several times mentioned the extent of the watershed and the increased flows (RT145-153, 811, 819, 882, 2478, 2716, 224, 227).

A damages instruction was given to the effect that the jury was authorized to offset the benefit of the existence of the Calleguas Creek facility as built by the Federal Soil Conservation Service on plaintiff's property with the reasonable damage the jury might find that plaintiff had suffered (RT2838). However, whether or not such an instruction is error is irrelevant since judgment was not for plaintiff with zero damages, but was rather a complete defense verdict. Furthermore, the jury should not get to the application of the special benefits offset because there has been no breach of any duty in the first place.

Away from the jury, the Court held its hearing on the liability phase of the California Constitution inverse condemnation case, and made its *factual finding* in favor of defendant. The jury later returned with a verdict in favor of the defendant by a 10 to 2 vote. Plaintiff's Motion for New Trial was denied.

Plaintiff appealed from said verdict. The California Appellate Court upheld the Trial Court's judgment denying liability on the California inverse condemnation theory, and further upheld the propriety of the Trial Court's ruling precluding the introduction of evidence of upstream development. The Appellate Court's original decision reversed and remanded the dangerous condition and breach of contract causes of action because of the perceived inapplicability of the discretionary immunity to dangerous condition liability and because of the perceived inappropriateness of the special benefits offset to damages. Both parties petitioned for rehearing. Rehearing was granted.

In its opinion on rehearing, the Court of Appeal reinstated the entire defense verdict, agreeing that *the FCD performed no deliberate act which caused damage to plaintiff's property*, that there was *no cause and effect relationship* between the FCD and the damage to plaintiff's property, that the land flooded *despite* the levees, and that it was unnecessary to discuss the instructional errors (concerning the discretionary immunity instruction and the special benefits offset) since appellant failed to establish a duty which the FCD breached.

By its original appeal, petitioner set out numerous issues on appeal (none of them federal questions). The reality of the matter was that petitioner wanted to change the law and place upon the FCD the duty to upgrade and increase the facility (which the FCD did not even build) to handle increased runoff resulting from upstream development.

Petitioner now admits that there is no constitutional obligation to upgrade the existing levee facility (petition for certiorari page 12). Indeed petitioner abandoned in its petition for review before the California Supreme Court, and thus has conceded, most of the issues in its original appeal.

SUMMARY OF ARGUMENT

In summary, it is respondent's position that no federal question has been presented for review. Petitioner's arguments concern only a California Constitutional provision for inverse condemnation and general language about the fact that takings in the abstract do on occasion occur.

It is the position of this responding party that the trial court's finding of fact on the issues of inverse condemnation are correct. It is further submitted that the Ventura County Flood Control District has no duty to upgrade the facility, that the Flood Control District is not an insurer of complete safety from flood damage, and that there is no constitutional requirement for perfection in flood control.

ARGUMENT

I

STANDARD OF REVIEW BY CALIFORNIA COURTS OF APPEAL

The Appellate Court presumes that the judgment or order appealed from was correctly decided by the Trial Court. *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, 86 Cal.Rptr. 65. Unless the record affirmatively demonstrates the error, the Appellate Court will presume that the

evidence and findings support the judgment and that the Trial Court based its decision on appropriate findings and disregarded incorrect or insufficient ones. *Kompf v. Morrison* (1946) 73 Cal.App.2d 284, 166 P.2d 350; *Brewer v. Simpson* (1960) 53 Cal.2d 567, 583, 2 Cal.Rptr. 609. Appellant has the burden of proving error. *Kriegler v. Eichler Homes, Inc.* (1969) 269 Cal.App.2d 224, 226, 74 Cal.Rptr. 749.

If the lower court decision was correct on any legal ground, it should be affirmed whether or not the reasons cited are wrong. *West Pico Furniture Co. v. Superior Court* (1961) 56 Cal.2d 407, 15 Cal.Rptr. 119; *Stone v. Los Angeles County Flood Control District* (1947) 81 Cal.App.2d 902, 907, 185 P.2d 396.

The Trial Court has the discretion to exclude evidence if it determines that the probative value of the evidence is substantially outweighed by the probability that its admission will either necessitate undue consumption of time, or create the substantial danger of undue prejudice, confusion of the issues, or misleading the jury. Evidence Code § 352. Upon review of such a discretionary ruling, the Trial Court's decision will not be reversed on Appeal unless there is manifest abuse of that discretion resulting in a miscarriage of justice, *People v. Wein* (1977) 69 Cal.App.3d 79, 137 Cal.Rptr. 814; *Baker v. Beech Aircraft Corp.* (1979) 96 Cal.App.3d 321, 157 Cal.Rptr. 779. The Appellate Court may not substitute its judgment for that of the Trial Court. *Cain v. State Farm Mutual Automobile Insurance Co.* (1975) 47 Cal.App.3d 783, 121 Cal.Rptr. 200.

With respect to the California inverse condemnation cause of action, it should be noted that said cause of action was tried before the Court, and *the Court was the finder of fact thereon.* Trial Court findings of fact will be upset on Appeal only when there is *no substantial evidence* to support them. *Marriage of Mix* (1975) 14 Cal.3d 604, 614,

122 Cal.Rptr. 79; *Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51, 64, 107 Cal.Rtpr. 45.

In applying the substantial evidence test, the reviewing Court must review the evidence in the light most favorable to respondent. *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 101 Cal.Rptr. 568. It should accept respondent's evidence as true, resolve all conflicts in the evidence in respondent's favor, and draw all favorable inferences that may reasonably be drawn. *Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 544, 138 Cal.Rptr.705.

In its statement of decision (CT2370-2374), which found in favor of defendant on the inverse condemnation causes of action, the trial court recognized that plaintiff's land was on a natural flood plain formed by alluvial deposits, that prior to the construction of the man-made structures storm waters spread over plaintiff's land, that prior to the U.S. Soil Conservation Service (SCS) improvement, the farmer's levees were subject to erosion and breakout, that the United States SCS under the local sponsorship of the Calleguas and Simi Soil Conservation Districts designed and constructed the levee improvements which are the subject of this action, that *the project was designed to hold 15,000 cubic feet per second (cfs) of water, that on the date of the flood which is the subject of this action the facility was capable of holding said 15,000 cfs, that the facility failed at 25,190 cfs,* that the facility failed by scour and/or tractive forces exceeding the design limitations of the levees as engineered and constructed by SCS resulting in undermining (though the court noted that the mechanism of the failure was irrelevant), that the service roads above the rock rip-rap were not installed by SCS to design height, that *the FCD reasonably maintained the SCS facility in the condition in which it was turned over to the FCD, and that plaintiff's damage did not occur because of the design or any faulty maintenance of the facility by the FCD.*

In its statement of decision, the trial court also correctly noted that the FCD was under no duty to construct the flood control system nor was it under any duty to provide an indestructible facility, that the FCD's only duty was to reasonably maintain the flood control improvement which had been turned over by SCS *as contructed*, that the FCD provided proper and adequate maintenance to maintain the integrity of the improvement, that the flood control system reduced the natural flooding of plaintiff's property, that the storm flow exceeded the carrying capacity of the improved channel (proximately causing the breach of the levee and the damage to plaintiff), that the FCD had no duty to provide plaintiff with a channel with increased capacity nor any obligation to improve the capacity of the channel to meet changing conditions attributable to upstream urbanization, and that therefore there was no basis for California inverse condemnation liability as against the FCD. The California Appellate Court agreed.

II

THE TRIAL COURT'S RULING ON THE INVERSE CONDEMNATION CAUSE OF ACTION WAS PROPER

Petitioner makes the claim that liability should be imposed as against the FCD automatically on the grounds that the injury was caused by an improvement as maintained by the FCD.

It is not the rule that a project built by *anyone* which *improves* a situation to an extent not satisfactory to a particular landowner subjects the entity which agrees to maintain the project to liability. *U.S. v. Sponenbarger* (1939) 308 U.S. 256, and *Weck v. Los Angeles County Flood Control District* (1947) 80 Cal.App.2d 182, 181 P.2d 935.

The FCD is not an insurer against all possible damage that might be inflicted on private property. *Stone, supra; House v. Los Angeles County Flood Control District* (1944) 25 Cal.2d 384, 392, *Tri-Chem, Inc. v. Los Angeles County Flood Control District* (1976) 60 Cal.App.3d 306, 132 Cal.Rptr. 142.

Extensive evidence was produced, and the trial court found, that *the project which failed was not the FCD's project.* The project was indisputably designed and built by the Soil Conservation Service of the U.S. Department of Agriculture (SCS). The FCD involvement in the process was not remotely sufficient to compel liability on its part for damage when the project functioned as designed but not quite well enough to suit plaintiff's liking.

Interestingly, petitioner makes the completely unsupported claim that it is undisputed that the FCD approved, accepted, and agreed to exclusively maintain the facility. No evidence has been set forth to support such an assertion, and in fact *the trial court found to the contrary.* While acceptance of a project can be sufficient for liability, the attributes of sufficient acceptance are not present in the instant action. In the cases holding acceptance to be sufficient, far greater involvement then that which exists in the instant case is found. *See,* for instance, *Heimann v. City of Los Angeles* (1947) 30 Cal.2d 746, 185 P.2d 597 (entity furnished plans and performed the design of the project); and *Sheffet v. County of Los Angeles* (1970) 3 Cal.App.3d 720, 734-735, 84 Cal.Rptr. 11 and *Frustuck v. City of Fairfax* (1963) 212 Cal.App.2d 345, 362-363, 28 Cal.Rptr. 357 (entity involved in actual requirements for planning and construction, furnished specific plans and specifications, substantially participated in the project).

The flooding which occurred in the instant action occurred *in spite of, not because of,* the FCD's activities. As set forth in *U.S. v. Sponenbarger, supra,* major floods may

sometimes overrun a river's banks *despite, not because of*, the government's best efforts, and in that case the government has not taken the plaintiff's property. The court stated:

> ". . . and the Fifth Amendment does not make the government an insurer that the evil of floods be stamped out universally before the evil can be attacked at all."

The duty of the FCD in this instance, when it has agreed to maintain a flood control facility built by the U.S. Soil Conservation Service is limited to not making matters worse. *Tri-Chem, supra, U.S. v. Sponenbarger, supra,* and *Janssen v. County of Los Angeles* (1942) 50 Cal.App.2d 45, 56-57. As set forth, there is no duty on the part of the FCD to build a flood control facility. *Tri-Chem, supra; Weck, supra; Shaeffer v. State of California* (1972) 22 Cal.App.3d 1017, 99 Cal.Rptr. 861; *U.S. v. Sponenbarger, supra.* There is also no duty to make a flood control facility impervious. *Stone, supra*; and *Janssen, supra* (otherwise there would be slight if any incentive for an entity to extend its aid at all). The California *Water Code Appendix* section which creates the Ventura County Flood Control District sets forth no mandatory duties upon the Flood Control District to contradict this well settled tenet of law.

To hold otherwise would create duties on the part of a flood control district which it could not afford to carry out. Major cleanout projects of the channel are already funded by the Federal government (CR632). The FCD has no power to increase the capacity of the channel (RT840, 870-871), nor does it have the funds (RT1009-1011, 1261-1263). In fact, the enabling legislation for the FCD itself provides specific funding limitations. *Water Code Appendix* §§ 46-12 and 46-12.2. The powers of the FCD to levy taxes and fees are limited by the terms of sections 46-12 and 46-12.2.

It is not, nor should it be, the law to require an entity which merely *agreed to maintain* a flood control facility which was built by the Federal government to increase the facility to take care of any additional runoff which may occur. The Trial Court herein correctly realized that it could not permit evidence of upstream development without implying that such a duty existed (RT178-179).

Since the FCD had only the duty to maintain the facility as constructed, at 15,000 cfs, and no duty to improve it, and since the flooding of plaintiff's property occurred *in spite of* rather than because of the facility or the FCD's maintenance of said facility, no inverse condemnation liability can attach.

Petitioner has made the claim that under the court's findings, it is entitled to judgment. Yet the Trial Court's decision recognized that plaintiff's land would have been flooded even without the improvement at all, that the FCD's maintenance was adequate and appropriate, that the facility as maintained was capable of retaining 15,000 cfs, that the facility failed at 25,190 cfs, and that the storm flow exceeded the carrying capacity of the improved channel, proximately causing the breach of the levee and the damage to plaintiff.

Petitioner for some reason feels that there is no need for the causation link. However, as the California appellate court amply noted in its decision, the question is indeed causation (original decision pages 30 and 33, decision on rehearing pages 22-26). As noted in the decision, the trial court found that the FCD adequately and reasonably maintained the channel and neither the maintenance nor any purported two foot difference between design height and height as constructed caused Davis Pacific's damage. *The channel was simply not designed to accept 25,000 cfs of water flow.*

This is not a situation where a defendant removed a portion of the facility or deliberately adopted a maintenance plan which the FCD knew was inadequate. The FCD's maintenance would rise to the level of construction only if it deliberately changed or altered the improvement as constructed or failed to replace or repair the improvement as constructed and its action caused the plaintiff's damage.

This trial court expressly found *no* negligence in the operation and maintenance of the facility on the part of the FCD. *The FCD's "project" (maintenance of the facility as built to a capacity of 15,000 cfs) did not fail.* As already set forth, the FCD is not an insurer against all possible damage that might be inflicted on private property. There is no taking if a facility makes a situation partially better, rather than totally better. *U.S. v. Sponenbarger, supra.* A design that was expected to fail once every fifty years is far better than a design which would fail every time it rained, which is what would occur without the levees. In other words, the SCS did not inflict upon plaintiff a project with a greater risk than plaintiff already had. The project was curative, not causative. No one can seriously contend that the rip-rapped levees were worse than no levees at all (which would permit waters to spread everywhere), nor that the project was worse than unreinforced and unmaintained sand levees which failed regularly, and which had no protection against erosion.

Since substantial evidence supported the trial court's conclusion in the form of its ruling in favor of the FCD on the inverse condemnation action, the appellate court's decision correctly affirmed said decision.

Lastly, the cases cited by petitioner do not provide authority for the relief petitioner requests.

The decision in *Pennsylvania Coal Company v. Mahon* (1922) 260 U.S. 393, 67 L.Ed. 322, 43 S.Ct. 158, concerned

the construction of a statute and whether said statute was sustainable under the police power. The *Pennsylvania Coal* decision merely stated that that particular statute went too far. This decision has nothing to do with the instant action.

Petitioner cites *Armstrong v. United States* (1960) 364 U.S. 40, 4 L.Ed.2d 1554, 80 S.Ct. 1563. However, *Armstrong*, like *Pennsylvania Coal*, merely contained general language that the Fifth Amendment to the United States Constitution bars takings. This general language has no bearing in the instant action, as the Fifth Amendment applies only to the Federal Government, and, more importantly, no taking has been shown herein.

Petitioner also cites this court to the *United States v. Willow River Company* (1945) 324 U.S. 499, 502, 89 L.Ed. 1101, 65 S.Ct. 761 for general language concerning when an individual is asked to assume more than its fair share of a public burden. *Willow River* had to do with a situation concerning riparian rights. The court of claims awarded $25,000.00 compensation for the impaired efficiency of a hydroelectric plant caused by the United States raising the water level of the river. The court in the *Willow River* case held that this did *not* constitute a taking requiring compensation. The *Willow River* court made a remark which is quite relevant to the instant action, stating:

> "[The Fifth Amendment] does not undertake, however, to socialize all losses, but those only which result from a taking of property."

Similarly, in the instant action, the mere suffering of a loss by petitioner herein does not compel the conclusion that said loss is to be socialized or is a taking entitling it to compensation.

Similarly, the case of *Monongahela Navigation Company v. United States* (1892) 148 U.S. 312, 37 L.Ed. 463, 13 S.Ct. 622 cited by petitioner makes the same holding as the

Willow River case, merely reciting general language concerning takings and compensation therefor. And *First Lutheran Church v. L.A. County* (1987) 107 S.Ct. 2378 was a regulatory taking case having nothing to do with the issues herein.

Petitioner also cites the case of *Lea Company v. North Carolina Board of Transportation* (1983) 304 S.E.2d 164, a North Carolina State Supreme Court decision, for the proposition that a 100-year flood is forseeable and the basis for inverse condemnation *under North Carolina Law*. This holding has no bearing on the instant case. In the instant action, the flood control district was not responsible for the improvement, and is not an insurer that the evil of floods be stamped out universally before it is attacked at all. *U.S. v. Sponenbarger, supra*. Additionally, the *Lea* case concerned the flooding caused by construction of a highway. The court therein construed the constitution of the State of North Carolina. The *Lea* court *upheld the trial court's finding* of fact that a 100-year flood was forseeable at the time of construction *of the highway*, noting that later activity could not be considered in terms of inverse condemnation. *Lea, supra* at page 174. The *Lea* court stated:

> "To require the State to anticipate the shifting of business and population centers and the attendant acts or construction by others contemporaneous or subsequent to the State's construction, and to hold the State liable for taking if it fails to do so, would place an unreasonable and unjust burden upon public funds. No such result is required by the Constitution of the United States or the Constitution of North Carolina."

Similarly, in the instant action, petitioners are complaining that upstream urbanization increased the water in the channel thus causing the channel failure. The Flood

Control District cannot be required to anticipate same, and the increased urbanization upstream does not create the duty on the part of the Flood Control District to upgrade a facility which it has only agreed to maintain as built.

Furthermore, even if a 100-year flood is foreseeable in the instant case, the FCD has no duty to prevent damage caused by a 100-year flood (*U.S. v. Sponenbarger, supra*), and petitioner's land would be damaged if the facility did not exist. This is in direct contrast to the *Lea* case, where the highway construction *caused* flooding which would not otherwise occur.

Plaintiff's citations to *U.S v. Lynah* (1903) 188 U.S. 445, 47 L.Ed. 539, 23 S.Ct. 349, and *United States v. Williams* (1903) 188 U.S. 485, 47 L.Ed. 554, 23 S.Ct. 363, are unpersuasive. Those cases involved the U.S.'s building of a dam obstructing a river and causing plaintiff's land to be permanently under 18 inches of water, causing *total* destruction in the value of the land. That activity was held to be a taking under the Fifth Amendment. Those cases merely stand for the proposition that when the United States Government takes land by means of the equivalent of emiment domain for public purposes, it must pay compensation. No such taking has occurred in the instant action.

The only case cited by petitioner for any proposition other than general tenets of law is *McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App.3d 683, 194 Cal.Rptr. 582. However, *McMahan's nowhere mentions the United States Constitution and is purely a California Constitution case,* and makes no holding concerning the United States Constitution. Also, in *McMahan's,* the defendant itself installed the watermains which later failed. In the instant action, the Flood Control District did not build the facility, but merely agreed to and did maintain it as built. Furthermore, in *McMahan's,* the

defendant had a maintenance program *known* to be inadequate. In the instant action, the maintenance was accomplished maintaining the facility as built, and indeed the facility in the instant action several times held far more than its design capacity.

It is submitted that this trial court's decision on inverse condemnation was correct, and that no duty to upgrade the facility nor to anticipate upstream development exists.

CONCLUSION

In sum, it is urged first that this court has no jurisdiction to grant certiorari in the instant action as no federal question is presented herein, nor has a federal question been presented nor ruled upon below.

Furthermore it is urged that the trial court's decision was correct on the California inverse condemnation issue, and that causation is a very real part of inverse condemnation liability. The mere fact that a facility fails is not sufficient in and of itself to support inverse condemnation liability. The flooding in this action occurred *despite not because of* the facility and the Flood Control District's activities.

Furthermore, it is asserted that no duty upgrade the facility, and in fact no ability to do so, exists. The only duty on the part of the FCD was to maintain the facility as built, and the Trial Court and the Appellate Courts correctly found that said duty was satisfied. The Flood Control District is not and should not be held to be an insurer that the evil of floods be stamped out universally before the evil can be attacked at all.

It is respectfully submitted that certiorari should be denied.

Dated: June 6, 1988

Respectfully submitted,

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